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IN THE

Supreme Court of the United States

October Term, 1964

No. 264

FRANK L. MARTIN, ODESSA MITCHELL and FLOYD HAZEL,

Petitioners,

v.

THE PEOPLE OF THE STATE OF NEW YORK.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK STATE

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Petitioners,

v.

THE PEOPLE OF THE STATE OF NEW YORK.

———o———

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK STATE

To The Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners pray for a writ of certiorari to review the judgment and decree of the Court of Appeals of New York State entered on March 18, 1965 in the above entitled cause affirming, without opinion, the judgment of the Appellate Term of the Supreme Court of New York, Second Judicial Department.

Opinion Below

The order of affirmance of the Court of Appeals which is unreported is appended hereto *infra* at pages 1a-2a. The Order and Memorandum Decision of Appellate Term, which is unreported, affirming the judgment of conviction of the District Court of the County of Nassau, State of New York, First District, is appended hereto *infra* at pages 3a-4a.

The District Court rendered no written opinion. Appended hereto *infra* at page 12a are pertinent portions of the Minutes of Trial evidencing the order of conviction of the District Court.

Jurisdiction

Jurisdiction of this Court is invoked pursuant to Title 28, Section 1257(3) of the United States Code. Judgment of the New York Court of Appeals was entered on March 18, 1965.

Questions Presented

I. Are the convictions of Petitioners barren of evidentiary support in derogation of their rights to due process of law under the Fourteenth Amendment to the United States Constitution?

II. Is § 722(1) and (2) so broad and vague as to deny petitioners due process of law under the Fourteenth Amendment to the United States Constitution?

III. Are the convictions of petitioners under § 722(1) and (2) an abridgement of their rights to freedom of expression, assembly and to petition for redress of grievances protected by the Fourteenth Amendment.

Statute Involved

Article 70, § 722 of the New York Penal Code, McKinny's Consolidated Law of New York, pages 383-384, is the statute pertinent to this case and is set out verbatim *infra* at pages 12a-13a herein.

Statement of the Case

On September 10, 1963, at approximately 8:30 p. m., petitioners, Mrs. Odessa Mitchell, Frank L. Martin and Floyd H. Hazel, as well as at least 200 to 300 other persons, attended a meeting of the Malverne-Lakeview Board of Education held in the auditorium of the Malverne Junior High School (R. 15, 16, 20, 21). Their attendance there was solely in response to a notice of the Board indicating that the meeting was public (R. 20, 42).

After the Board had transacted its usual business, questions from the floor were entertained (R. 15). Incident to an array of challenging remarks from members of the audience, at approximately 9:30 p. m. the President of the Board abruptly adjourned the meeting, directed everyone to leave and with other Board members marched from the stage, unceremoniously leaving the attending public seated in the auditorium (R. 15, 16, 24).

Assistant Superintendent of Schools, Mr. Wolff, whose obligations included securing the building, reappeared about 9:45 p.m. and directed the members of the public, still waiting, in the auditorium to leave the premises (R. 16). In response to Mr. Wolff's statement, members of those attending the meeting stated that they would not remove themselves until they had had an opportunity to meet and discuss issues with the Board of Education (R. 47). At approximately 10 p.m., a considerable number of persons remained still awaiting an opportunity to meet with the Board when Mr. Wolff again appeared and requested that all persons leave (R. 16). Gradually, the number of persons still waiting in the auditorium dwindled to 25 and, eventually, at 10:15, only the three petitioners remained (R. 24). Mr. Wolff returned and told petitioners to leave. They made no response but continued to sit peacefully and quietly (R. 23-24, 27-29). After advising petitioners that he would summon the police if they did not obey his request, Mr. Wolff left the auditorium (R. 17). Mr. Robert Murphy, the custodian whose job it was to perform the physical task of closing the building and who had been present throughout this period, then "went on about to see that the doors were locked, to see that no one could get in yet they could still leave when they wanted to" (R. 29-30).

Mr. Wolff returned at 10:30 and saw that petitioners were still sitting (R. 24). He immediately left the building, went to the police station and filed a complaint charging petitioners with violation of § 722(1) and (2) of the New

York Penal Code (R. 25, 35). Patrolman Caulin and the Chief of Police arrived at the auditorium at 11 o'clock and placed petitioners under arrest for disorderly conduct (R. 35). The petitioners were at all times cooperative (R. 35, 37-38).

Trial of this cause was held on November 15, 1963 in the District Court of the County of Nassau, First District. At that time, the trial court refused the following proffered evidence: that the sole purpose of all petitioners attending the meeting was to raise with the Board of Education issues concerning the Commissioner's decision and order of June 17, 1963, a second order of August 13, 1963, and a third order of September 1963, all of which directed the Board to integrate its schools, and a notice of the Board of Education entitled "School District No. 12, Special Edition, June, 1963", dated June 28, 1963 (R. 42-45). All of the said documents were excluded from evidence (R. 45). Further, the trial court refused to allow testimony to show that the sole reason for petitioners' presence in the auditorium and effort—during and after the meeting—to converse with Board members was to register their protest against the Board's refusal to implement the Commissioner's decision referred to above (R. 45, 48-49). The evidence that Hazel had repeatedly attempted to raise questions from the floor but was not recognized was also excluded (R. 45). The minutes of the Board of Education were likewise excluded from evidence over the objection of petitioners (R. 19).

The federal questions preserved and raised herein were set forth in a pretrial motion for dismissal of the information at the conclusion of petitioners' memorandum of law provided the court prior to commencement of the trial, consistent with New York practice. The motion for dismissal was on the grounds that the activities of petitioners did not fall within § 722(1) and (2) under which they were charged; that any contrary conclusion by the court would be an invasion of federal rights guaranteed by the Fourteenth

Amendment to the United States Constitution, and that petitioners' conduct was protected by the First Amendment guarantees of freedom of speech and assembly, and to petition for redress of grievances. At the conclusion of the state's case, petitioners raised these issues in the course of a motion to dismiss, alleging further failure of the state to present a *prima facie* case; that the proof adduced was wholly at variance with the information, and that the prosecution of petitioners for disorderly conduct pursuant to § 722(1) and (2) was a denial of due process of law in contravention of the Fourteenth Amendment to the United States Constitution. In their argument, petitioners relied on *Edwards* v. *South Carolina*, 372 U. S. 229 (R. 38-39). This motion was denied by the trial court and the portion of the record indicative thereof is set out at pages 40-41 of the Record and is included herein *infra* at page 12a. The motion to dismiss was renewed after the completion of petitioners' case and was summarily denied by the trial court without comment (R. 49; pp. 11a-12a).

Petitioners were found guilty of offenses under § 722(1) and (2) and fined Fifty Dollars ($50) or, in the alternative, thirty (30) days in jail. A stay of execution, pending filing of a Notice of Appeal was refused. The fines were paid. A Notice of Appeal from the order and judgment of the trial court was filed on November 29, 1963, in which were preserved the issues raised at trial and an Amended Notice of Appeal was filed on November 30, 1963 (R. 2-4). Further, the Specification of Error set forth in petitioners' brief before that court consistent with New York practice, preserved all questions raised herein. The Appellate Term, First Department, affirmed the judgment of the trial court on May 29, 1964, and the order and judgment thereof are contained at pages 56-58 of the Record and pages 3a-5a, *infra*. Leave was granted petitioners by Judge Fuld for an appeal to the Court of Appeals of New York State on October 2, and a Notice of Appeal was filed on October 13, 1964 in which were preserved the issues here presented to

this Court (R. 53, 54, 55). A brief was filed containing a Specification of Error preserving all questions raised herein and on March 18, 1965, the Court of Appeals affirmed the judgment of Appellate Term (pp. 1a-2a).

In the belief that the decision below conflicts with decisions of this Court and raises constitutional questions of public importance, petitioners seek review by this Court.

I

The convictions of petitioners under Section 722 (1) and (2) of the New York Penal Code are not supported by any evidence and constitute a denial of due process of law in violation of the Fourteenth Amendment.

Conviction of petitioners for disorderly conduct under § 722(1) and (2) of the New York Penal Code on a record devoid of evidence of guilt is in violation of their rights guaranteed by the due process clause of the Fourteenth Amendment to the United States Constitution, *Thompson* v. *Louisville,* 362 U. S. 199 (1960). Moreover, the decision below is in direct conflict with the decision and rationale of *Garner* v. *Louisiana,* 368 U. S. 157 (1961), where this Court reversed appellants' convictions holding that their activities were not within the contemplation of the statute.

Section 722(1) and (2) provides as follows:

> 722. Any person who with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned, commits any of the following acts, shall be deemed to have committed the offense of disorderly conduct:
>
> 1. Uses offensive, disorderly, threatening, abusive language, conduct or behavior;
>
> 2. Acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others.

There is no dispute as to the conduct in which petitioners engaged. The evidence adduced at the trial shows that subsequent to an abruptly concluded public meeting of the local school board, petitioners remained in a school auditorium in protest against the board's conduct of the meeting, its refusal to afford a forum for discussion of integration of the school system, as well as its failure to desegregate its school system as ordered by the State Commissioner of Education (R. 15, 16, 45, 48-49). Petitioners sat peacefully and were silent (R. 23, 24, 27-29). Their declination to the request of the Assistant Superintendent, Mr. Wolff, to leave the premises was decorous (R. 23-24, 27-29). When police officers arrived on the scene and placed petitioners under arrest, they did not resist but peacefully acquiesced (R. 37-38).

The courts below were required to determine, on the basis of evidence presented, the preliminary and fundamental issue of whether or not the conduct for which petitioners were arrested and convicted constituted disorderly conduct within the meaning of § 722(1) and (2). Both the judgment of the trial court and the Order and Memorandum Decision of the Appellate Term, which was affirmed by the Court of Appeals, reflect implicit error in violation of petitioners' constitutional rights and in disregard of well settled New York law.

The trial court's judgment rested solely on the ground that petitioners, by remaining seated in a school room "must have intended to start something" and that their refusal to leave upon request constituted disorderly conduct (R. 40-41, 49). Similarly, Appellate Term's affirming decision rests on a determination that petitioners' refusal to leave the auditorium "and in obstructing the efforts of school officials to close the school was unlawful" (R. 56-57). Neither conclusion survives examination.

The record is barren of evidence of actual or implied intent to "start something" or of actions "obstructing"

anyone's activities. Rather, the record is clear that petitioners were totally inactive. They did not obstruct any attempt of the Assistant Superintendent and custodian to close the school (R. 23, 24, 27, 29). In fact the custodian went about his task of locking doors without any interference from petitioners (R. 29-30).

Specific reference must be made to petitioners' convictions under Section 722(1) which evidence a peculiar perversion of justice. The trial court specifically found that petitioners used no abusive and insulting language (R. 40).[1] In its Memorandum Decision, Appellate Term noted that the evidence was sufficient to sustain the conviction for disorderly conduct, referring only to § 722(2) (R. 57; p. 4a). Yet petitioners were found guilty under § 722(1) as well as § 722(2) and their convictions were sustained under both subsections (R. 49; pp. 1a-3a). In upholding the charges under § 722(1), the New York courts have proceeded on the assumption that an accused found guilty under one subsection of a statute suffers no prejudice by being convicted under another, even after judicial cognizance of the complete lack of evidence to support the charge. This variant of guilt by association is a reckless abuse of judicial process and a patent disregard of the requisites of due process of law as enunciated in *Thompson* v. *Louisville, supra.*

That the evidence does not constitute the offense charged finds overwhelming support in the New York cases heretofore construing the statute involved. As discussed in Point II, *infra*, it is the departure from a narrow and apparently, constitutional construction that further contributes to the invalidity of the conviction of petitioners.

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[1] The affidavit of the complainant, the Assistant Superintendent of Schools, charged petitioners with ". . . intent to provoke a breach of the peace and whereby a breach of the peace was occasioned, used offensive, disorderly, abusive and insulting language, conduct and behavior . . ." (R. 5, 6). This language is identical with section 722(1). In testifying, complainant himself refuted this charge (R. 27, 28).

Both the statute on its face and all previous construction of § 722(1) and (2) by the New York Court of Appeals establishes that the main portion of the statute qualifies the conduct described in subsections (1) and (2); hence conduct cannot constitute the offense of disorderly conduct, absent evidence that the prerequisite conditions exist, *i.e.*, that there be a ". . . person who with intent to provoke a breach of the peace or whereby a breach of the peace may be occasioned . . ." who commits the enumerated acts. The absence of evidence of intent to provoke a breach of the peace or of conditions whereby such a breach might be occasioned is fatal to the constitutionality of the convictions below. This requirement is the same as that set forth in Title 14, Article 103 of the Louisiana Criminal Code considered by this Court in *Garner* v. *Louisiana, supra.* There, as in the instant case, it was obvious from a reading of the statute that the conditions described in the general portion of the statute must first occur to support a finding of violation of the statute.[2]

The record is devoid of evidence that any acts of petitioners occasioned a breach of the peace or may have occasioned a breach of the peace. Rather, it reflects that

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[2] Under Louisiana Law, disturbing the peace is the doing of any of the following in such a manner as would foreseeably disturb or alarm the public:

"(1) Engaging in a fistic encounter; or

"(2) Using of any unnecessary loud, offensive, or insulting language; or

"(3) Appearing in an intoxicated condition; or

"(4) Engaging in any act in a violent and tumultuous manner by any three or more persons; or

"(5) Holding of an unlawful assembly; or

"(6) Interruption of any lawful assembly of people; or

"(7) Commission of any other act in such a manner as to unreasonably disturb or alarm the public."

in lieu of requisite evidence, the trial judge substituted his conjectures upon which he then relied to support his decision. At the close of the state's case the trial judge stated:

> Well, Counselor, according to the memorandum of the District Attorney . . . conduct which tends to breach the peace is within certain limitations a matter of discretion on the part of the Court. It is immaterial whether any breach of the peace actually occurred or whether the person affected was actually annoyed. *There was no question here these people were committing an unlawful act by remaining in the building when they should have left* . . . . (R. 40). (Emphasis supplied.)
>
> • • •
>
> . . . . Now I don't find that they used any abusive, insulting language but their conduct and behavior was such as to interfere with the Custodian and Assistant Superintendent preventing them from closing the school. The Superintendent could have forcibly removed them, which would have certainly caused a breach of the peace and the authorities hold that it is sufficient as prima facie case to show that the acts interfered or tended to interfere with another. The evidence in my mind clearly establishes the Defendants interferenee or conduct which tended to interfere with the school. The Defendants conduct was such that a breach of the peace might have been occasioned thereby. A breach of the peace is predicated upon some intentional or provocative action on the part of the Defendant. Now these Defendants certainly intended, by staying in the school, to start something . . . (R. 40-41).

In refusing to admit testimony as to the purpose of the meeting and petitioners attendance, the court said:

> The point is that after the meeting was over he refused to go home when he was ordered to do so or to leave the building *that's the only charge against him here*, that they were disorderly after the meeting was over (R. 45). (Emphasis supplied.)

These conclusions of the trial court are in conflict with the testimony of both defense and state witnesses. The conduct of Assistant Superintendent Wolff completely refutes any inference that he would have used self help to eject petitioners. Mr. Wolff testified that he informed the petitioners of the opposite fact, that if they remained, he would summon the police (R. 17). Utilization of conjectures of the court and conclusions unsupported by evidence to sustain a conviction are violative of petitioners' fundamental right to due process. As Mr. Justice Frankfurter stated in his concurring opinion in *Garner* v. *Louisiana, supra*:

> . . . a judge's knowledge, or even "knowledge by notoriety" . . . not presented as part of the prosecution's case capable of being met by a defendant, is not an adequate basis, as a matter of due process, to establish an essential element of what is punished as crime.

The court below, by affirming petitioners' conviction without any opinion, ignored the plethora of settled decisional law, consistent with the literal wording of the act, which holds that § 722(1) and (2) encompasses only those acts which are public in character and which actually breach or tend to breach the public peace.[3] Moreover, in all decisions, the New York Court of Appeals has held that disturbances which are not inflicted on the public, but occur in relatively private circumstances, are not violative of § 722(1) and (2). *People* v. *Perry*, 265 N. Y. 362, 193 N. E. 177 (1934); *People* v. *Chesnick*, 302 N. Y. 58, 96 N. E. 2d 87 (1950); *People* v. *Monnier*, 280 N. Y. 77, 19 N. E. 2d 789

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[3] The definition of a breach of the peace often cited by the Court of Appeals is "a disturbance of public order by an act of violence, or by any act likely to produce violence, or which by causing consternation and alarm, disturbs the peace and quiet of the community . . ." *People* v. *Most*, 171 N. Y. 423, 64 N. E. 175 (1902). See also *People* v. *Carcel*, 3 N. Y. 2d 327, 165 N. Y. S. 2d 113 (1957); *People* v. *Nixon*, 248 N. Y. 182, 161 N. E. 463 (1928).

(1939); *People* v. *Carcel*, 3 N. Y. 2d 327, 144 N. E. 2d 81 (1957); *People* v. *Feiner*, 300 N. Y. 391, 91 N. E. 2d 316 (1950), aff'd, 340 U. S. 315 (1951); *People* v. *Harvey*, 307 N. Y. 588, 590, 123 N. E. 2d 81 (1954). The essential element of actual or potential disturbance of the *public* is lacking in this case.

In *People* v. *Perry, supra*, the Court of Appeals overturned convictions of three defendants who had engaged in a rough and violent brawl in the presence of a third party within a restaurant owned by one of the defendants. Reversal was based on the ground that fighting in a private place could not constitute a breach of the peace. The court noted that the defendants annoyed and disturbed no one and that onlookers, who stood outdoors, were present only for their curiosity and amusement. At page 364, the court said:

> In the orthodox language of an indictment, any criminal act is against the peace and dignity of the people, but not every criminal act is a breach of peace in the common law sense of that term. A breach of the peace . . . is a disturbance of public order by an act of violence or by any act likely to produce violence, or which, by causing consternation and alarm, disturbs the peace and quiet of the community. Every case where the offense is charged must depend upon the time, place, and circumstances of the act . . . Fighting in a public place 'to the terror of his majesty's subjects' is at common law an offense against the public peace; an affray, 'so called because it affrighteth and maketh men afraid . . .' Fighting in a private place is at common law no crime unless it amounts to assault . . .

Since the decision in *People* v. *Perry, supra*, it has been clear that acts cannot constitute disorderly conduct within the intent or meaning of § 722(1) and (2), absent a public which is affected or may be affected by the acts complained of, so as to result in a breach of the peace or to make such

a breach imminent. In *People* v. *Monnier, supra,* where the New York Court of Appeals, relying on *People* v. *Perry, supra,* reversed a conviction under § 722(1) and (2) for use of vile language in a telephone conversation with the complainant, the court stated at page 78:

> Since the decision of *People* v. *Perry*, it has been settled that acts charged as disorderly conduct must be public in character and such as actually to tend to disturb the public peace and quiet.

The court continued, that had the same comments which formed the basis of the charge been uttered in the office of complainant, no one else being present, the same result would obtain.

In *People* v. *Chesnick, supra,* the same court gave a further definitive statement of the nature of the public which must be affected by disorderly conduct to support a conviction under § 722(1) and (2). In affirming the reversal of conviction, where a defendant standing on a stairway made and used violent language which was overheard by tenants in the building, the court characterized this conduct as disorderly and an interference with the peace and quiet of some of the occupants in the dwelling. It held the disturbance to be a private one and at pages 60 and 61, stated:

> The key phrase of the statute is "breach of the peace," and traditionally, that language means a violation of public order and tranquility . . . Here there was no trouble of the wanted calm of the whole community, or of any sizeable segment thereof.

In *People* v. *Harvey, supra,* the principle that acts condemned under § 722(2) must be public in character and breach the public peace or tend to do so was reiterated by the court in distinguishing the disorderly conduct described in § 720 from that in § 722.

People v. *Feiner, supra,* further illustrates that a *public* disturbance is required to constitute "disorderly conduct"

in violation of § 722. The Court of Appeals affirmed the conviction under § 722(1) and (2) of Feiner who had addressed a crowd of 75-80 Negroes and whites, urging Negroes to assert their rights by force of arms. He had refused to leave in the face of repeated police requests made after the crowd evidenced restlessness. The court held that the defendant's conviction did not violate his right to freedom of speech in view of the state's interest in preserving the peace and the manifestation that a breach thereof was imminent. On pages 401 and 402 of its opinion, the court in distinguishing *Terminiello* v. *Chicago,* 337 U. S. 1 (1949), stated that had the same speaker addressed a crowd of persons in a private hall, who exhibited reactions similar to those in the case before it, violation of § 722(1) and (2) would have been foreclosed.

The instant case is analogous to *People* v. *Carcel, supra,* which illuminates the type of activity which may be carried out in a public place with impunity, even though it inconveniences a substantial segment of the public—a condition which is absent from this case. Defendants had peacefully walked back and forth before the United Nations building carrying placards and distributing leaflets. The court held that the mere fact that pedestrians were inconvenienced thereby was insufficient for conviction under § 722(2) and stated at page 331:

> . . . It is abundantly clear that the conduct sought to be deterred by subdivision 2 is considerably more serious than the apparently innocent and, so far as appears from the record, inoffensive conduct of the defendants here . . .

Concededly, the courts below were confronted with a novel circumstance, but novelty does not validate judicial attenuation of constitutionally protected rights. Due process cannot be retroactively supplied by judicial conclusions

in lieu of supporting and essential evidence. Acts, orderly or disorderly, which do not disturb or do not tend to disturb the public peace cannot constitute disorderly conduct within § 722(1) and (2) even though they inconvenience and disturb some persons. Moreover, acts which affect only a small segment of the public, although disorderly in themselves, cannot be said to disturb the public peace. In the case before this Court there was no public to be disturbed. Other than the arresting officers who responded to the Assistant Superintendent's call, only five individuals were involved.

Assuming *arguendo* that petitioners, by remaining silent and seated in a public building, commit some offense, it is not that with which they were charged. Having been arrested for violation of § 722, it is imperative that the evidence sustain the offense charged. *Thompson* v. *Louisville, supra; Garner* v. *Louisiana, supra.* The question regarding petitioners' conviction under both § 722(1) and (2) is not whether their conduct would support a charge for some other offense; this is immaterial. Convictions under a charge never made "would be a sheer denial of due process." *De Jonge* v. *Oregon,* 299 U. S. 353, 362 (1937); *Garner* v. *Louisiana, supra; Thompson* v. *Louisville, supra; Cole* v. *Arkansas,* 333 U. S. 196, 201 (1948).

Our system of criminal jurisprudence does not tolerate the tailoring of a law to fit activities sought to be terminated because those activities are both unusual and unpalatable to a complainant. The record in this case, which established only that petitioners remained inside a public building, sitting quietly, until placed under arrest by authorities, is insufficient to establish disorderly conduct within § 722(1) and (2) of New York Penal Code and is therefore a fundamental denial of due process of law.

II

Section 722(1) and (2) of the New York Penal Code is so broad and vague on its face and in application as to deny petitioners due process of law as guaranteed by the Fourteenth Amendment.

On its face, § 722(2) of the New York Penal Code is so broad and vague that it not only fails to give fair warning of the acts proscribed contrary to this Court's decisions in *Bouie* v. *City of Columbia*, 378 U. S. 347 (1964); but it also straddles the constitutional divide between wrongful and federally protected conduct, in contravention of the principles enunciated in *Cox* v. *Louisiana*, 379 U. S. 536 (1965); *Edwards* v. *South Carolina*, 372 U. S. 229 (1963); *Stromberg* v. *California*, 283 U. S. 359 (1931); *Herndon* v. *Lowry*, 301 U. S. 242 (1937); *Winters* v. *New York*, 333 U. S. 507 (1948); *Terminiello* v. *Chicago, supra;* and serves as a ready repository for punishment of viscerally perceived "wrongs" or offenses penalized by other sections of the Code. The dangers inherent in a statute of this breadth and scope are fully realized in this case.

Neither the statute on its face or, as previously construed, apprises an accused that a refusal to disengage from peaceful activity, without regard to whether a breach of peace ensues or is likely to ensue, falls within its circumscription. The inescapable conclusion derived from a scrutiny of previous construction of § 722(1) and (2) by the Court of Appeals of New York is that it does not reach conduct taking place in relative seclusion, affecting only an insignificant number of persons and which, above all, does less than make a breach of peace imminent. *People* v. *Perry, supra; People* v. *Chesnick, supra; People* v. *Monnier, supra; People* v. *Carcel, supra; People* v. *Feiner, supra.*

Notwithstanding these determinations, the Court of Appeals, peremptorily—without benefit of explanation—affirmed the judgment of Appellate Term, whose memorandum decision sets forth the novel ground on which it sustained petitioners' convictions (R. 57):

> . . . Although defendants' attendance at the meeting of the public school board in the Malverne Junior High School in order to protest the alleged failure of the board to correct the racial imbalance in the schools was proper, their subsequent conduct in refusing to leave within a reasonable time after the conclusion of the meeting, upon request of the authorities, and in obstructing the effort of school officials to close the school was unlawful (R. 57).

Likewise, the trial court made it abundantly clear, in denying petitioners' motion to dismiss after the prosecution rested, that the gravamen of the complaint against petitioners was their remaining in the school after the meeting was adjourned [4]:

> Now these Defendants certainly intended by staying in the school to start something . . . (R. 41).

* * *

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[4] The trial court continually reiterated its assumption that petitioners' mere refusal to leave the premises constituted disorderly conduct:

> The Court: Counsellor it's conceded here that this man had a right to go to the meeting. The point is that after the meeting was over he refused to go home when he was ordered to do so or to leave the building that's the only charge against him here, that they were disorderly after the meeting was over (R. 45).
>
> * * *
>
> The Court: I have already ruled that we are not going to take that testimony, the only charge here is that you refused to move after you were ordered to do so and after the meeting was over (R. 47).
>
> * * *
>
> The Court: . . . Counselor you don't do the testifying for him. He was told to leave and he didn't leave, that's the whole problem here. He admits he was told to leave and he refused to leave.
>
> You don't deny that you were told to leave, do you (R. 49).
>
> * * *
>
> A. I don't deny I was told to leave.
>
> The Court: And you didn't leave?
>
> A. I did not leave.
>
> The Court: All right, that's the point of the case (R. 49).

> Well, they ordered them to go out and they didn't go, it's a logical conclusion that they stayed there to do something (R. 41).

To "do something" is not yet a crime in New York State or elsewhere, to petitioners' knowledge. What the Court of Appeals has done in this instance is not to interpret the law, but to radically change it for the purpose of disposing of the case before it, in complete disregard of and in direct conflict with this Court's decision in *Bouie* v. *City of Columbia, supra.*

Indeed, in affirming petitioners' conviction, the Court of Appeals has taken a more extreme position than that of the Supreme Court of South Carolina in *Bouie* v. *City of Columbia,* 239 S. C. 570, 124 S. E. 2d 332 (1962), which this Court reversed. In the *Bouie* case, the Supreme Court of South Carolina construed a trespass statute which this Court later determined to be specific and innocuous on its face, and which expressly forbade entry on property after being given notice, in such a way as to broaden its periphery to proscribe the act of remaining on property after notice to leave. This Court said that the judicial construction by the South Carolina court so extended the meaning of a statute, narrow on its face, as to fail to give notice of the acts condemned to an accused who relied on its literal reading.

In the present case, the New York court has taken a statute initially broad on its face—unlike the narrowly-drawn statute in *Bouie*—and construed its provisions to further broaden its reach to encompass the act of refusing to leave a public place on request of the authorities, without regard to whether a breach of peace occurs or may be occasioned, within that court's prior construction of the meaning of those words. Petitioners submit that § 722(1) and (2) as so interpreted renders their convictions as culpable as that of the defendants in the *Bouie* case.

Failure to give notice is but one condemnatory feature of § 722(1) and (2). It also fails in express terms and by judicial construction to limit its application only to that conduct which may be constitutionally prohibited within the confines of this Court's decisions in *Stromberg* v. *California, supra; Herndon* v. *Lowry, supra; Winters* v. *New York, supra; Terminiello* v. *Chicago, supra; Edwards* v. *South Carolina, supra; Cox* v. *Louisiana, supra.*

Section 722 (1) and (2) bears great similarity to the interpretation the Louisiana court gave a "breach of peace" statute condemned by this Court in *Cox* v. *Louisiana, supra.* The specific provisions were "congregating with others with intent to provoke a breach of the peace or under circumstances such that a breach of the peace may be occasioned" which the Louisiana court interpreted to mean "to agitate, to arouse from a state of repose, to molest, to interrupt, to hinder, to disquiet." This definition, this Court said, would allow persons to be punished for unpopular views. See in accord *Edwards* v. *South Carolina, supra; Terminiello* v. *Chicago, supra.* Mr. Justice Clark, while concurring in the *Cox* decision, rejected the rationale advanced by the majority that the statute was unconstitutionally vague on the basis of its similarity to § 722(2):

> Certainly the language in the present statute is no more vague than that in the New York statute which was challenged on vagueness grounds in *Feiner* v. *New York,* 340 U. S. 315.

Undoubtedly, on its face, the statute here in issue is as broad as that in the *Cox* case. The only real distinction to be drawn between the two statutes is the construction given each by the highest court of the respective states. In the *Feiner* case, the Court of Appeals, by implication, construed the breach of peace provisions to minimize application of the statute to protected activity, the statute being deemed applicable to Feiner's conduct only to the extent that such conduct was held to present a clear and present danger of

violence erupting in the crowd of 75 or 80 persons forming his audience. Thus the vagueness of the statute was cured by an opinion of the state court confining its applicability to only that speech presenting a clear and present danger of a breach of the peace. A vague statute may thus be saved. *Winters* v. *New York, supra* and *Fox* v. *Washington,* 236 U. S. 273, 277 (1915). See also *Cox* v. *New Hampshire,* 312 U. S. 569 (1941).

It is submitted that the Court of Appeals has stripped § 722(1) and (2) of the constitutional safeguard erected in the *Feiner* case. Instead, its affirmance of petitioners' conviction indicate that § 722(1) and (2) stands as a bare indictment of any conduct which annoys, disturbs, interferes with, obstructs or is offensive to others, without regard to whether a danger of public disorder exists or not. As in *Terminiello* and *Cox* v. *Louisiana, supra,* the construction of § 722(2), condemns conduct which is fully entitled to First Amendment protection or which, minimally, may not be proscribed in the absence of a statute which clearly and specifically indicts such behaviour. In this context, it is immaterial whether petitioners own conduct could be regulated "by a statute drawn with the requisite specificity." *Dombrowski* v. *Pfister,* 380 U. S. 479 (1965). See in accord *Thornhill* v. *Alabama,* 310 U. S. 88, 97-98 (1940); *NAACP* v. *Button,* 371 U. S. 415, 432-433 (1904).

But the resident dangers of § 722 are neither restricted to its failure to definitively warn of criminal conduct nor its trespass of the line of demarcation between constitutionally protected and wrongful activity. Section 722(2) is also a classic catch-all mechanism. Its broad sweeping terms are an invitation to law enforcement officials to use it as time-saving device for punishing acts penalized by other sections of the Code, rather than expend time and effort in correlating wrongs with specific statutory sections. Indeed, in express recognition of the danger that attempts might be made to use it as a vehicle for punishing unrelated

wrongs *in the past,* courts of New York have sought to narrow its reach, *People* v. *Perry, supra; People* v. *Schroedel,* 147 Misc. 296, 263 N. Y. S. 658 (2d Dept. 1933); *People* v. *Ennis,* 45 N. Y. S. 2d 446 (Utica 1943); *People* v. *Yost,* 61 N. Y. S. 2d 447 (Utica 1946).

This statute by its very broadness is a standing temptation to prosecutors and courts to use it to punish conduct which may offend their private mores, but violate no law. The New York courts have yielded to that temptation in the present case. The trial judge found it inconceivable that petitioners sitting-in in a school auditorium was merely a form of protest against the Board of Education's policies. Hence, he reasoned, they must have intended something and that something was in violation of the law. Although recognizing that petitioners were engaging in protest activity, Appellate Term found that a refusal to leave school property "upon request of the authorities . . . was unlawful" (R. 57). Unlike the trial court, Appellate Term made no pretense of rationalizing petitioners' "unlawful" conduct in terms of the breach of the peace requirement of the statute. Petitioners' persistence in sitting-in after a demand from constituted authority to desist was *per se* unlawful. It is clear that these courts made private morality a proxy for public law, and were given this license by the vagueness of § 722(2).

It is a well recognized fact that the sit-in, as well as other demonstrations, is a much utilized form of protest. They may irritate, annoy, and disturb, but are designed to persuade those who are being petitioned to a different course of action. Whether the form of protest is fully entitled to the protection accorded free speech is not the basic issue here. Nor is it petitioners' proposition that New York State is obligated to open all its forums to civic protest. However, it cannot, as stated in Mr. Justice Black's concurring opinion in *Cox* v. *Louisiana, supra,* (which is contained in *Cox* v. *Louisiana,* 379 U. S. 559, 579

(1965)), prohibit such activity as picketing, parading and congregating "in the absence of a clear, narrowly-drawn, nondiscriminatory statute . . ." specific in definition.

In enunciating this doctrine, Mr. Justice Black relied on *Edwards* v. *South Carolina, supra.* Appellate Term also relied on *Edwards* to support its doctrine that petitioner's protest activity could be condemned since they were not in a place where they had a right to be. That Appellate Term's reliance on *Edwards* is misplaced is reaffirmed by *Cox* v. *Louisiana,* 379 U. S. 536. The manifest error of the court below is its mistaken assumption that § 722 is that clear and narrowly drawn, that Mr. Justice Black, in the *Cox* case, portended could proscribe protest activity in certain places.

Petitioners were not convicted under a statute specifically illegalizing sit-ins on school property. Petitioners were not convicted under a statute specifically making criminal a refusal to leave government property on the request of governmental personnel. They were convicted merely because they presumed to challenge, in a seemingly novel but altogether appropriate manner, the power and authority of governmental officials to arbitrarily discontinue public discussion on public issues, merely because of their disagreement with the views propounded. A statute so embracive erodes the civic responsibility of both those who administer the law and those to whom it is administered, and is destructive of the principles of democratic society.

III

The conviction of petitioners violates their rights to freedom of expression, assembly and to petition for redress of grievances contrary to the guarantees of the First and Fourteenth Amendments.

The unconstitutionality of petitioners' conviction derives not only from the absence of a statute definitively outlawing their conduct but from the very nature of their acti-

vities at the time of their arrest. Petitioners were invoking one of the most basic and pristine forms of dissent known to democratic society. Petitioners were challenging the right of their governmental representatives to dictatorially terminate public debate, solely because they disagreed with the views advanced. The Malverne-Lakeview Board of Education expressly invited the public to attend their meeting, and after disposing of their usual business specifically requested questions and comments from the attending public, consisting of 200 to 300 persons, an unusually large group for an ordinary board meeting (R. 15, 16, 20, 21, 42).

The size of the group was indicative of the controversy and interest aroused over the issue of integrated schools in the Malverne-Lakeview area. The Board of Education had been ordered by the New York State Commissioner of Education on June 17, 1963, to institute a specific school integration plan (R. 43). This order was reaffirmed on August 13, 1963 after the Board requested and was denied a rehearing (R. 43-44). Petitioners, and no doubt the bulk of those present, attended that meeting to ascertain whether the Board had determined to comply with the Commissioner's order or would continue to seek postponing implementation.

Hence, when the discussion was opened to the public, questions and statements relevant to this issue were responsively directed to the Board of Education (R. 15). Rather than afford a democratic forum for the discussion of valid grievances, the Board retreated from an inquiring public and abruptly terminated an *apparently* public meeting because it disagreed with the public it presumably represents.

The Board, by the initial act of inviting public discussion, created a forum in which views wholly agreeable to itself or completely distasteful might be expressed. Such meetings are not made public to obtain the presence of disinterested bystanders to witness the ritual of a board

meeting. By their very nature, public meetings are tools by which public bodies may become responsive to a community, by being subjected to face approbation or disapprobation and, as such, basic to democratic government. It is not merely by voting that electors and taxpayers perform their duty but by seeking to influence, by ready means, policy makers and administrators while the issues are current.

While the Board of Education had at its disposal the expedient and censorious device of refusing to remain as a means of discontinuing an uncomfortable challenge to its actions, petitioners exerted the non-violent, but completely suitable, means of sitting, to precipitate continuation of discussion, the only reasonable alternative to the Board's censorship policy. Failing that, they remained as a mode of expressing their continuing dissent from the policies of the Board of Education and its inadmirable withdrawal from public discussion, to the end that the Board would reconsider its action and resume a meaningful discussion in the near future.

Both *Terminiello* v. *Chicago, supra,* with its decisive condemnation of limiting freedom of speech to impotent verbiage and *Edwards* v. *South Carolina, supra,* in its recognition that "The Fourteenth Amendment does not permit a state to make criminal the peaceful expression of unpopular views" (372 U. S. at 238) are persuasive that First Amendment guarantees are intended to insure the communication of ideas. These cases posit the concomitant right to peacefully protest attenuation of protected communication which is equivalent to the "prior restraints" consistently condemned in such cases as *Thomas* v. *Collins*, 323 U. S. 516 (1944) and *Herndon* v. *Lowry, supra.*

Undoubtedly, the method chosen by the Board to shield itself from public scrutiny greatly inconvenienced the 100 people or so who remained behind expectantly. Their incon-

venience could not have been less than that alleged inconvenience to the complainant in this case and is rendered no less significant by the fact that all except the three defendants, eventually left to end that inconvenience and frustration caused the invited public by the Board's disruption of all discussion and debate.

The basic issue here is not as posed by the New York State Court—whether responsible protesting citizens inconvenienced a complaining local official—but, rather, whether citizens are compelled to submit to government censorship of public discussion because to do otherwise *per se* annoys, disturbs, interferes with, obstructs or is offensive to government officials.

This Court has not tolerated ordinances which, even potentially, permitted local officials to censor views of the citizenry. *Near* v. *Minnesota,* 283 U. S. 697 (1931); *Lovell* v. *Griffin,* 303 U. S. 444 (1938); *Hague* v. *C. I. O.,* 307 U. S. 496, 515 (1939); *Cantwell* v. *Connecticut,* 310 U. S. 296 (1940); *Kunz* v. *New York,* 340 U. S. 290 (1951); *Stromberg* v. *California, supra; Terminiello* v. *Chicago, supra; Edward* v. *South Carolina, supra; Cox* v. *Louisiana, supra.* It is at least equally intolerable to allow local officials to arbitrarily discriminate against citizens in the absence of a specific statute or ordinance authorizing the discrimination. *Lombard* v. *State of Louisiana,* 373 U. S. 267 (1963). As was said in *Lombard, supra,* at page 273:

> [a] State, or a city, may act as authoritatively through its executive as through its legislative body. As we interpret the New Orleans city officials' statements, they here determined that the city would not permit Negroes to seek desegregated service in restaurants. Consequently, the city should be treated exactly as if it had an ordinance prohibiting such conduct . . . . [*t*]*he state cannot achieve the same result by an official command which has at least as much coercive effect as an ordinance.* The officials command here was to direct continuance of segre-

> gated service in restaurants, and to prohibit any conduct directed towards its discontinuance; it was not restricted solely to preserve the public peace in a nondiscriminatory fashion in a situation where violence was present or imminent by reason of public discrimination. (Emphasis supplied.)

This Court has also held that one need not abandon or delay the exercise of fundamental freedoms in the face of an unconstitutional demand. *Wright* v. *Georgia,* 373 U. S. 284 (1963). *De Jonge* v. *Oregon, supra; Smith* v. *Cahoon,* 283 U. S. 553, 562 (1931); *Lovell* v. *Griffin, supra.* In this case, petitioners as well as other members of the public, were faced with an unconstitutional demand to leave, directly analogous to the demand of the peace officer in *Wright* v. *Georgia, supra,* which this Court held need not be obeyed.

This is not an instance where persons, without express invitation, intruded on government property and sought to protest grievances at their own time and choice of place. Rather, petitioners sought to advance their views in a forum to which they expressly had been invited. The school board, perhaps, need not have opened its meeting, but having done so, it may not arbitrarily limit or condition the constitutionally protected right of expression. *Speiser* v. *Randall,* 357 U. S. 513 (1958); *Buckley* v. *Meng,* 35 Misc. 2d 467, 230 N. Y. S. 2d 924, 933 (1962). See *Sherbert* v. *Verner,* 374 U. S. 398, 405 (1963); *Torcaso* v. *Watkins,* 367 U. S. 488, 495 (1961).

Freedom of speech is not subject to abridgment at a public assembly solely because government officials happen to be presiding and become annoyed. While it is clear that the school board had no obligation to prolong the meeting to allow every dissenting voice to be heard, its premature termination of discussion solely to ward off criticism and silence dissent is a blatant exercise of unconstitutional censorship.

As this Court stated in *Garrison* v. *Louisiana*, 379 U. S. 64 (1965), at pages 74-75:

> . . . For speech concerning public affairs is more than self-expression; it is the essence of self-government. The First and Fourteenth Amendments embody our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co.* v. *Sullivan, supra*, 376 U. S. at 270.

The judicial sanction given petitioners' conviction, arising as they did from criticism of government, is contrary to the rationale of *New York Times* v. *Sullivan*, 376 U. S. 254, 265 (1964) where this Court stated that where invalid restrictions are imposed on freedom of speech, "[t]he test is not the form in which state power has been applied but, whatever the form, whether such power has been in fact exercised." See *International Products Corporation* v. *Koons*, 325 F. 2d 403 (2nd Cir. 1963); *Sweeney* v. *Patterson*, 128 F. 2d 457 (D. C. Cir. 1942):

There is no authority supporting criminal rather than civil judicial process to restrain and prevent ventilation of views regarding the conduct of government officials. The actions of both the School Board and the Assistant Superintendent of Schools, in willfully suppressing free expression have been ratified by the highest court of New York. The importance of the decision below and its unavoidable ramifications should not be minimized because of the relatively minor penalties imposed. Rather, it constitutes a precedent whereby the constitutional guarantees of freedom of expression and due process of law may be circumvented and derogated because the specific offense charged invites application of evidentiary rules purposed to obscure violation of implicit and important constitutional rights.

Petitioners do not assert an unfettered right to express their beliefs in circumstances which interfere with equally important rights of the public nor do they contend that all activity is, *a fortiori*, protected by virtue of the existence of the First Amendment. Petitioners stand convicted of the offense of disorderly conduct, not for conducting themselves in a disorderly manner, but for seeking, through peaceful means, to utilize a public forum which their governmental representatives had created, and to which petitioners had been invited, and which those same representatives arbitrarily destroyed in order to avoid any exchange of expression. Such action is in contravention of the thesis, controlling in this case, stated by this Court in *Stromberg* v. *California, supra:*

> The maintainance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.

CONCLUSION

For the reasons advanced heretofore, it is respectfully submitted that this Petition for Writ of Certiorari be granted.

Robert L. Carter,
Joan Franklin,
Barbara A. Morris,
20 West 40th Street,
New York, New York 10018,
Attorneys for Petitioners.

APPENDIX

Order of the Court of Appeals

Sup Ct. — No. 460

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

against

FRANK L. MARTIN, ODESSA MITCHELL and FLOYD H. HAZEL,
Defendants-Appellants.

BE IT REMEMBERED, That on the 20th day of November in the year of our Lord one thousand nine hundred and sixty-four, Frank L. Martin, Odessa Mitchell and Floyd H. Hazel, the appellants in this cause, came here unto the Court of Appeals, by Robert L. Carter, their attorney, and filed in the said Court a Notice of Appeal and return thereto from the judgment of Appellate Term of the Supreme Court, Second Judicial Department; And The People of the State of New York, the respondent in said cause, afterwards appeared in said Court of Appeals by William C. Cahn, District Attorney.

Which said Notice of Appeal and the return filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Robert L. Carter, of counsel for the appellants, and by Mr. Henry P. DeVine, of counsel for the respondents, and after due deliberation had thereon, did order and adjudge that the judgment herein be and the same hereby is affirmed.

AND IT WAS ALSO FURTHER ORDERED, that the record aforesaid, and the proceedings in this Court, be remitted to the

District Court of the County of Nassau, there to be proceeded upon according to law.

THEREFORE, it is considered that the said judgment be affirmed, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the District Court of the County of Nassau, before the Judges thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said District Court, before the Judges thereof, &c.

RAYMOND J. CANNON,
Clerk of the Court of Appeals of the
State of New York.

COURT OF APPEALS, CLERK'S OFFICE, } ss.:
Albany, March 18, 1965. }

I HEREBY CERTIFY, that the preceding record contain a correct transcript of the proceedings in said appeal in the Court of Appeals, with the papers as fully filed therein, substantial thereto.

RAYMOND J. CANNON,
Clerk.

Order of Affirmance by Appellate Term

At a term of the Appellate Term of the Supreme Court, held in and for the Second Judicial Department at the Borough of Brooklyn, on the 29th day of May, 1964.

Present:

WALTER R. HART,
JAMES S. BROWN,
WILLIAM B. GROAT,
Justices.

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

vs.

FRANK L. MARTIN, ODESSA MITCHELL and FLOYD H. HAZEL,
Appellants.

The above named, Frank L. Martin, Odessa Mitchell and Floyd H. Hazel defendants herein having appealed to the Appellate Term of the Supreme Court from a judgment of conviction of the District Court, County of Nassau at Mineola rendered on the 15th day of November, 1963 after trial convicting them of a violation of Section 722, Subd. 1 and 2 of the Penal Law and imposing sentence as follows: Each fined $50 or 30 days in the County Jail, and the said appeal having been argued by Jawn A. Sandifer, of counsel for the appellants and argued by Martin I. Silberg of counsel for the respondent, and due deliberation having been had thereon it is hereby

ORDERED AND ADJUDGED that the judgment of conviction so appealed from be and the same are hereby affirmed.

JUDGE HART,
J. S. C.

Memorandum Decision of Appellate Term

APPELLATE TERM

by HART, BROWN, GROAT, *J.J.*

DECISION OF CRIMINAL COURT APPEALS

PEOPLE, etc.,

Respondent,

v.

FRANK L. MARTIN, ODESSA MITCHELL and FLOYD H. HAZEL.

Ap. (N.)—JUDGMENTS OF CONVICTION UNANIMOUSLY AFFIRMED.

The evidence was sufficient to sustain the conviction for disorderly conduct (Penal Law, Section 722, Sup. 2). Although defendant's attendance at the meeting of the public school board in the Malverne Junior High School in order to protest the alleged failure of the board to correct the racial imbalance in the schools was proper, their subsequent conduct in refusing to leave within a reasonable time after the conclusion of the meeting, upon request of the authorities, and in obstructing the efforts of school officials to close the school was unlawful. Defendants rely on *Edwards* v. *South Carolina* (372 U. S. 229), as authority for their conduct. The case is readily distinguishable. In *Edwards* they were outside the State House, where they had a right to be, peacefully picketing, without obstructing traffic or interfering with the rights of others. In the case before us, the defendants were not legally in the place from which they were requested to leave after the meeting had been adjourned and the school was closed to the public. As noted

in the *Edwards* case (at page 236) "we do not review in this case criminal convictions resulting from the evenhanded application of a precise and narrowly drawn regulatory statute evincing a legislative judgment that certain specific conduct be limited or proscribed. If, for example, the petitioner had been convicted upon evidence that they had violated a law regulating traffic or had disobeyed a law reasonably limiting the period during which the State House grounds were open to the public, this would be a different case." (Emphasis supplied.) In the recent case of *Henry* v. *City of Rock Hill* (— U. S. —, 84 S. Ct. 1042), decided by the Supreme Court of the United States on April 6, 1964, the Court had previously remanded the case to the Supreme Court of South Carolina "for further consideration in light of *Edwards* v. *South Carolina* (372 U. S. 229)." In reversing the judgment of the state court, the Supreme Court stated:

> "We know that Edwards and Fields control the result here. As in those cases, the petitioners here, *while at a place where the state's law did not forbid* them to be, were engaged in the peaceful expression of unpopular views (*Edwards* v. *South Carolina*, 372 U. S. at 237). They assembled in a peaceful, orderly fashion in front of the City Hall to protest segregation." (Emphasis supplied.)

Thus, although the Supreme Court had decreed that the Fourteenth Amendment prohibits a state from making criminal the peaceful expression of "unpopular views," this does not imply that persons wishing to exercise the right to express their views may comport themselves in a manner which will constitute disorderly conduct as defined in our penal statute.

Excerpts from Minutes of Trial

DISTRICT COURT OF THE COUNTY OF NASSAU

STATE OF NEW YORK—FIRST DISTRICT

Index Nos. CR 2294, CR 2295, CR 2296.

Violation Sec. 722-1, 2 Penal Law.

THE PEOPLE OF THE STATE OF NEW YORK,

against

FRANK L. MARTIN, ODESSA MITCHELL,
FLOYD H. HAZEL,

Defendants.

• • •

CLEMENT WOLFF, of 60 Spring Lane, Levittown, New York, having been sworn, testified as a witness for the People herein as follows:

• • •

Cross-examination by Mr. Sandifer:

• • •

Q. Were there any minutes kept of this particular board meeting on September 10, 1963? A. Certainly, every board meeting has minutes kept for it.

Q. Do you have those board minutes in Court?

Mr. Weinberg: Objection, your Honor.

The Court: That would be immaterial, Counselor, because this occurrence took place after the Board Meeting was over. So what happened at the Board Meeting is of no concern here.

Clement Wolff—for People—Cross

Mr. Sandifer: Your Honor, I intend to show that—

The Court: I don't care what you intend to show, Counselor, I rule that it's immaterial and that's it. You have an objection to my ruling?

Mr. Sandifer: I do have an objection.

Q. Dr. Wolff, were public notices sent out of this particular board meeting?

Mr. Weinberg: Objection, immaterial.

The Court: That's immaterial also.

Mr. Sandifer: Your Honor, I intend to show this complaint here —

The Court: I don't care what you intend to show, you're going to go according to the rules of evidence here. Now, what happened before this meeting is of no consequence as far as whether or not these people are guilty of disorderly conduct. Now, they're charged with being disorderly after the Board Meeting was over and the Board of Education had left the building and that's all I'm going to try.

Mr. Sandifer: Well, may I call your attention to the fact that the complaint specifically states that the Defendants congregated in the auditorium without the permission of the school authorities.

The Court: That's right, they were ordered to leave and they stayed there after they were told to leave and that's it. So there is no question but what they were legally there in the first place; but when they were told to leave they didn't leave.

Mr. Sandifer: Well, your Honor, I submit that this raises a serious question as to whether or not these people were in fact guilty of a possible trespass rather than a disorderly conduct here; they have not been charged with that.

The Court: That's what we are going to find out, Counselor; but we are not going to find out by finding out whether the Board of Education sent out notices, I have ruled that out. Now, whether they were legally there when the Board adjourned and the Board left and they were told to go home they should have gone home now what happened after is what we are going to try here, nothing else.

Q. Dr. Wolff— A. Mr.

Q. Were you present, Dr. ———, withdrawn. How many people were physically present in this auditorium during the course of the meeting of the Board of Education? A. My estimate would be two to three hundred.

Q. And can you tell us whether or not the subject of implementation of certain orders of the Commissioner of Education were discussed at this meeting?

Mr. Weinberg: Objection.

The Court: Sustained.

Mr. Sandifer: Your Honor, may I have a recess for a few moments, please?

The Court: Every time I make a ruling against you, Counselor, you automatically get an objection on the record.

Mr. Sandifer: May I have a recess for just a few moments?

The Court: No, you go right ahead with the case.

Mr. Sandifer: Your Honor, at this time I would like to make a proffer of proof.

The Court: All right, go ahead.

Mr. Sandifer: I'd like to make the following proffer: that if I were permitted to propound the questions to this witness, this witness would show first of all this was a public meeting in which public notices had been sent out to the general public.

Colloquy of Court and Counsel

The Court: That's granted, Counselor, I will take judicial notice that that's a fact.

Mr. Sandifer: I would also make a proffer that the Defendants that are here charged were on the school property, had attended the school meetings and that they were there for a legitimate purpose, namely to discuss with the Board of Education—

The Court: I don't care what they were there for and they were there legitimately originally there is no question about that, Counselor, you don't have to prove that that's admitted here, they had a right to go there to that meeting. The only question is they didn't leave after the meeting was over and refused to leave, that's where the trouble starts and that's the only thing I'm going to try here, there is no other issue here before me.

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The Court: Well, Counselor, according to the memorandum of the District Attorney which he handed to me it says here conduct which tends to breach the peace is within certain limitation a matter of discretion on the part of the Court. It is immaterial whether any breach of the peace actually occurred or whether the person affected was actually annoyed. There was no question here these people were committing an unlawful act by remaining in the building when they should have left. I am going to reserve decision on your motion until I check these cases. It's time for lunch so the Court is adjourned until 2:00 o'clock and I'll decide your motion at that point.

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The Court: All right Counselor, I'll decide your motion. I find that the People have made a prima facie case against the Defendants because under the Section, I'm going to quote it, Sec. 722, "any person who with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned, commits any of the following acts shall be

deemed to have committed the offense of disorderly conduct: 1. Uses offensive, disorderly, threatening, abusive or insulting language, conduct or behavior; 2. Acts in such a manner as to annoy, disturb, interfere with, obstruct or be offensive to others; "no, that's Sec. 2. Now I don't find that they used any abusive, insulting language but their conduct and behaviour was such as to interfere with the Custodian and Assistant Superintendent, preventing them from closing the school. The Superintendent could have forcibly removed them, which would have certainly caused a breach of the peace and the authorities hold that it is insufficient as prima facie case to show that the acts interfered or tended to interfere with another. The evidence in my mind clearly establishes the Defendants interference or conduct which tended to interfere with the school. The Defendants conduct was such that a breach of the peace might have been occasioned thereby. A breach of the peace is predicated upon some intentional or provocative action on the part of the Defendant. Now these Defendants certainly intended, by staying in the school, to start something and therefore your motion is denied and you have an exception. No go ahead with the defense.

Mr. Sandifer: Mr. Hazel take the stand.

Your Honor, I want to specifically put on the record that I certainly take issue with that portion of your statement that these Defendants intended to remain in the school in order to start something. I think that is prejudcial.

The Court: Well, they ordered them to go out and they didn't go, it's a logical conclusion that they stayed there to do something.

* * *

Mr. Sandifer: If the Defendant Hazel were permitted to testify and answer the questions propounded, the Defendant Hazel would testify that pursuant to the public notice of the Board of Education of September 10, 1963

and as an officer and the President and the leader of the Lakeview Branch that it was his purpose in attending the meeting of September 10 to discuss with the members of the Board of Education the orders and the documents referred to.

Mr. Weinberg: Objection.

The Court: Counselor it's conceded here that this man had a right to go to the meeting. The point is that after the meeting was over he refused to go home when he was ordered to do so or to leave the building that's the only charge against him here, that they were disorderly after the meeting was over.

Mr. Sandifer: If the Defendant Hazel were permitted to testify and to answer the questions propounded, the Defendant Hazel would testify that during the course of this meeting that was attended by some five or six hundred people in attendance, that repeatedly the Defendant Hazel, acting as a resident and taxpayer and the President of the Lakeview Branch, that repeatedly he attempted to raise from the floor the questions that were in his mind and in his judgment was carrying out his responsibility of the officer of the Association to question the Board as to what their position was and whether or not they intended to comply with the lawful orders of the State Commissioner of Education and that the Board of Education denied this recognition.

The Court: All right, Counselor, we have laws to take care of situations like that. People can't take the law in their own hands, that has no bearing on the charge before the Court here.

Offer of proof is denied.

Mr. Sandifer: The Defendants rest.

The Court: All right, make your motion.

Mr. Sandifer: On behalf of all three Defendants, your Honor, the Defendants respectfully move to dismiss on the

entire case on the grounds that the People have failed to prove their case beyond a reasonable doubt.

The Court: Motion is denied, Counselor. All right come up here you three defendants. I find all three of you defendants guilty as charged and the sentence of the Court is that you each pay a fine of $50 or you serve thirty days in the County jail.

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McKinney's Consolidated Laws of New York, Article 70, Section 722

"Any person who with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned, commits any of the following acts shall be deemed to have committed the offense of disorderly conduct.

1. Uses offensive, disorderly, threatening, abusive language, conduct or behavior;

2. Acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others;

3. Congregates with others on a public street and refuses to move on when ordered by the police;

4. By his actions causes a crowd to collect, except when lawfully addressing such a crowd;

5. Shouts or makes a noise either outside or inside a building during the night time to the annoyance or disturbance of any considerable number of persons;

6. Interferes with any person in any place by jostling against such person or unnecessarily crowding him by

placing a hand in the proximity of such person's pocket, pocketbook or handbag;

7. Stations himself on the public streets or follows pedestrians for the purpose of soliciting alms, or who solicits alms on the public streets unlawfully;

8. Frequents or loiters about any public place soliciting men for the purpose of committing a crime against nature or other lewdness;

9. Causes a disturbance on any street car, railroad car, omnibus or other public conveyance, by running through it, climbing through windows or upon seats, or otherwise annoying passengers or employees therein;

10. Stands on sidewalks or street corners and makes insulting remarks to or about passing pedestrians or annoys such pedestrians;

11. Is engaged in some illegal occupation or who bears an evil reputation and with an unlawful purpose consorts with thieves and criminals or frequents unlawful resorts.

12. In any prosecution under subdivision eleven of this section the fact the defendant is engaged in an illegal occupation or bears an evil reputation and is found consorting with persons of like evil reputation, thieves or criminals shall be prima facie evidence that such consorting was an unlawful purpose."